

Station Manager. (Tr. 4433; TBF PFCL ¶¶188, 191.) And one must completely ignore the fact that TBN's religious programming does a great deal "of substance" for the minority community, unless one dismisses as irrelevant the influential role played by the church in minority communities in discouraging violence, preserving families, fostering racial harmony, guiding drug and alcohol addicts, and feeding the homeless and the poor. (TBF PFCL ¶177.) Glendale/SALAD do ignore this evidence, but the Presiding Judge should not. Despite Glendale/SALAD's efforts to restrict and ignore the record, NMTV does have a personality, and the minority community would be profoundly worse off without its service.

24. SALAD's financial argument also ignores the evidence. For example, Glendale/SALAD ignore the fact that in 1990, before the Wilmington petition was filed and when the Portland station was only about a year old, Jane Duff had already investigated a replacement for TBN's financial services. (TBF PFCL ¶204.) At the hearing she testified very specifically about her efforts, identifying the company she contacted and describing the basis on which it proposed to provide the service. (Tr. 1426-27.) If NMTV were really conceived to be a permanent part of TBN, it is inexplicable why Mrs. Duff would look elsewhere for these services, especially when NMTV's operation was at a very early stage. Glendale/SALAD also ignore the evidence that, in other situations, the execution of an Agreement to Provide Business Services like the one that NMTV and TBN entered in January 1991,

before the Wilmington petition, was an affirmative step in the process that led to the cessation of TBN's financial services. (Tr. 2364; see also Tr. 2999-3000, TBF PFCL ¶209.) And, while SALAD and Glendale say that NMTV can never make the \$3 million payment to TBN due in 1998, the facts say otherwise. (SALAD PFCL ¶¶53-54; Glendale PFCL I ¶570.) By the end of 1992, NMTV already had annual revenue of \$2.9 million, annual profit nearing \$1.0 million, and net assets of \$2.5 million. (MMB Ex. 413, p. 1.) Its revenues had grown from \$137,940 in 1988, to \$427,209 in 1989, to \$1,669,167 in 1990, to \$2,139,337 in 1991, to \$2,915,383 in 1992. (Id., pp. 1, 7.) In four years, NMTV has grown dramatically, and its ability to repay the TBN loan is not open to doubt. Glendale/Salad's argument is pulled from thin air; it has no evidentiary basis whatsoever.

25. Glib arguments are easily made when the applicable Commission policies and the evidence are ignored. By failing to address any of the pertinent policy authorities and much of the relevant evidence, the Glendale/SALAD submissions are not even minimally reliable as proposed findings and conclusions and should be disregarded.

## **2. Reasonableness of Paul Crouch's Reliance on Colby May**

26. Glendale/SALAD propose that the Presiding Judge begin his Initial Decision by citing two matters that are not directly related to the designated issues. (Glendale PFCL I ¶¶6-8.) One involves a main studio relocation by TBN 20 years ago that led

to a forfeiture. (Id. ¶8.) While Glendale/SALAD are naturally desperate to discredit TBN, the main studio matter did not impugn TBN's basic qualifications in 1974 and has no bearing on this case now. Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1229 (1986) ("Character Policy Statement") (even character violations, which this was not, normally have a 10-year statute of limitations). TBN's licenses have repeatedly been renewed for over 20 years without any adverse determination on TBN's basic qualifications. That record, of course, contrasts sharply with Glendale's George Gardner, who shortly before filing Glendale's Miami application was formally placed under heightened scrutiny for misrepresentations and lack of candor in another Commission proceeding. RKO General, Inc. (WAXY-FM), 5 FCC Rcd 642, 644 (1990). (TBF Ex. 257; TBF Ex. 260, p. 2.)

27. The other preliminary matter cited by Glendale/SALAD is the Initial Decision of Administrative Law Judge Thomas B. Fitzpatrick in International Panorama TV, Inc. (KTBN-TV), FCC 83D-4, released January 25, 1983 ("International Panorama"). (SALAD Ex. 35; Glendale PFCL I ¶¶6-7.) That decision affirmed TBN's basic qualifications concerning events occurring in 1977 and 1978. (SALAD Ex. 35.) Citing errors attributed to attorney James Gammon in that decision, Glendale/SALAD argue that it was therefore unreasonable for Paul Crouch to rely on counsel Colby May to provide relevant information to the Commission. (Glendale PFCL I ¶¶6, 622, 627; SALAD PFCL ¶112 and n. 10.)

However, they ignore the facts of that case, which establish that precisely the opposite is true.

28. The Presiding Judge is respectfully referred to SALAD Exhibit 35, p. 18 (¶¶66 and 67), and p. 21 (¶6), and Tr. 3572-73. What happened in International Panorama was that, unknown to Dr. Crouch, Mr. Gammon had advised TBN to assert the attorney-client privilege in that proceeding. The privilege covered several letters written a few years earlier that were unfavorable to TBN. During discovery in the proceeding, the letters were found in the law firm's files by attorney Colby May, who "didn't agree" that the privilege should be claimed. Mr. May thought it important that what had transpired be put on the record. Dr. Crouch already had instructed that full disclosure to the Commission be made. As soon as he learned about the unfavorable letters and that they had been withheld on grounds of privilege, he immediately waived the privilege and directed that the letters be produced. Judge Fitzpatrick specifically concluded:

"It is clear that Crouch would have directed immediate disclosure of these letters had he been made aware of their existence by communications counsel." (SALAD Ex. 35, p. 21, n. 38) (emphasis added.)

When he became aware of the letters as a result of Colby May's intervention, he did order them to be disclosed.

29. Based on that experience, Dr. Crouch had a very strong reason to rely in good faith on Colby May's judgment to provide the Commission all information relevant to NMTV's applications.

Mr. May had proved his integrity in a case that was vitally important to TBN because renewal of its flagship station, KTNB, was at stake. With the entire network on the line, it was Colby May who (a) discovered harmful information in his law firm's files, (b) disagreed that the information should be concealed from the Commission by a claim of privilege, no matter how legitimately asserted, (c) urged that Dr. Crouch be advised of the information so it could be put on the record, and (d) caused the information to be produced in the Commission proceeding. That important experience gave Dr. Crouch every good reason thereafter to rely on Mr. May as his counsel to assure that TBN always provided all relevant information to the Commission.

30. Having ignored the most pertinent aspect of International Panorama, Glendale/SALAD also ignore highly relevant testimony in this proceeding. They make much of Dr. Crouch's testimony (Tr. 2674) that he told Mr. May to make clear to the Commission what the relationship between TBN and NMTV was. In fact, to make sure that the Presiding Judge does not miss it, Glendale cites the same passage eight times. (Glendale PFCL I ¶¶63, 74, 112, 187, 314, 325, 343, 623; SALAD PFCL ¶107.) However, Glendale/SALAD completely ignore Dr. Crouch's clarifying testimony, where he explained that "what I instructed my counsel to do was to file and put on the record everything ~~he~~ ~~felt~~ necessary to put on the record," that "I spoke in error" in the earlier testimony regarding specific relationships, that "I simply instructed counsel to reveal to the agency everything ~~he~~

deemed necessary," that "I didn't know what all of the information was necessary," and that "I simply believed that he would put on the record everything necessary to determine if we met the requirements or not." (Tr. 2755-57, emphasis added; TBF PFCL ¶262.) Mr. May also testified that Dr. Crouch "basically relied on me to prepare [and] present the material that I thought was required," "he relied on me" for "a complete and open disclosure to the Agency of all factors that....I felt.... should be reported to them," "[h]e directed me to....submit to them any and all material that you think is important or relevant or that [the] Agency ought to know," and he "relied on me to make that evaluation and to advise him accordingly and then prepare the documents and to submit to the Commission those things that I thought were part of the process and required in the process." (Tr. 3197, 3202-03, 3205-06, 3379, 3380; emphasis added; TBF PFCL ¶257.)

31. International Panorama establishes that Dr. Crouch has in fact directed that counsel disclose all relevant information to the Commission and that he was totally justified in trusting Mr. May to do so. The complete record, not just the single page Glendale/SALAD cite, establishes that Dr. Crouch in fact relied on Mr. May to provide such information concerning NMTV's application under a new Commission policy about which Dr. Crouch as a layman could have no independent understanding. Moreover, the advice that Mr. May gave to Dr. Crouch -- that NMTV qualified under the rule because a majority of its Directors were

minorities -- was the same advice Mr. May had given regarding NMTV's qualification for the minority preference in translator and low power applications, advice that the Mass Media Bureau agrees was correct. (MMB PFCL ¶¶304-05.) From Dr. Crouch's perspective, there was no basis for questioning that advice. Mr. May's advice also represented an interpretation of the Commission's policy that was similar to Commissioner Patrick's understanding when the rule was adopted. (TBF PFCL ¶659.) Again, from Dr. Crouch's perspective, there was no basis for questioning that advice. Considering all of the circumstances, Dr. Crouch's reliance on Mr. May was entirely reasonable, and the record supports no conclusion that he intentionally withheld information from the Commission.

32. Although Glendale/SALAD try to bolster their argument with a personal attack on Mr. May and his alleged inexperience (Glendale PFCL I ¶¶53, 624; SALAD PFCL ¶112), that tactic is both factually and logically unfounded. By 1987 when the Odessa and Portland applications were filed, Mr. May had been practicing communications law for seven years, with three additional years as a full-time law clerk. (TBF Ex. 105, pp. 5-6.) After seven years, attorneys in large and elite firms become partners and acquire senior responsibility for representing clients. Nothing about that amount of experience logically suggested that Dr. Crouch should have questioned Mr. May's competence or advice.

33. Moreover, contrary to Glendale/SALAD's argument, experience is not the test of integrity. As discussed above, Colby May had proven his honesty and disposition to disclose even unfavorable information to the Commission. That performance was the foundation of his relationship with Dr. Crouch, who thus had no reason to doubt him. In contrast, Commission cases show that even counsel with decades of experience are not always so forthcoming. See, e.g., Metroplex Communications, Inc. (WHYI-FM), 4 FCC Rcd 8149, 8160-61 (Rev. Bd. 1989), affirmed, 5 FCC Rcd 5610 (1990), affirmed sub nom. Southeast Florida Broadcasting Limited Partnership v. FCC, 947 F.2d 505 (D.C. Cir. 1991); WWOR-TV, Inc., 7 FCC Rcd 636, 639, 640, 642-43 (1992), affirmed sub nom. Garden State Broadcasting L.P. v. FCC, 996 F.2d 386 (D.C. Cir. 1993).<sup>5/</sup> Therefore, Glendale/SALAD's attack on Mr. May's alleged lack of experience is baseless.

34. Glendale/SALAD badly misplace their reliance on Algereg Cellular Engineering, FCC 94R-12, released July 22, 1994, and

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<sup>5/</sup> In Metroplex, an applicant represented by counsel with 30 years experience certified its financial qualifications without disclosing a \$500,000 bonus payable to counsel that rendered the applicant financially unqualified. When the issue was raised, experienced counsel advanced "the cynical proposition" that he would defer payment to the 91st day, thereby "merely fudging" the 90-day deadline. The applicant was found financially unqualified. In WWOR-TV, experienced counsel, who knew the crucial importance of the date of the applicant's formation meeting, failed to locate and disclose business records in his files which established that date, even though production of such documents had been ordered. After the Commission remanded for further inquiry, the documents were turned over, and they established that counsel's earlier testimony lacked credibility and was misleading.



WWOR-TV, supra (Glendale PFCL I ¶¶610, 620). Far from reliance on counsel, those cases involved active conspiracies between principals and counsel to violate rules that specifically prohibited the filing of certain applications. In Algreq, Commission rules specifically barred cellular applications by parties having partial settlements with, or ownership interests in, other applicants. FCC 94R-12 at ¶¶24-25. The record showed that counsel and principals actively conspired to violate those prohibitions, holding meetings at which counsel clearly explained the intention to circumvent the purpose of the rules, stated that the Commission would reject the proposal if asked, and specifically discussed the need to keep the arrangement secret from the Commission and public. Id. at ¶¶19, 20, 64, 67, 68. In those circumstances, where it was clear that both principals and counsel knew that the rules were being circumvented, the principals could not reasonably claim reliance on counsel.

35. Similarly, in WWOR-TV principals and counsel conspired to contravene a provision of the Communications Act that specifically barred the filing of applications "for the purpose of reaching or carrying out" a settlement agreement. 7 FCC Rcd at 636, 637. The record contained clear evidence that both principals and counsel knew that the application had been filed precisely for that prohibited purpose because, while withholding specific evidence that the Presiding Judge had ordered the applicant to produce, they both explained the purpose of the

application with the same story, which "collapsed" once the truth came out. Id. at 638-39, 640-41, 642-43. Moreover, once the evidence emerged, the witnesses materially changed their version of events in testimony at a remand hearing and in submissions to the Commission. Id. at 639-40.

36. In the present case, Paul Crouch's reliance on Colby May is far different. There is no evidence that they conspired to violate the rules. The record shows that Dr. Crouch relied on Mr. May to advise him about a new Commission policy and to provide the Commission with all information that counsel believed was relevant. That was entirely reasonable. To be sure, reliance on counsel cannot overcome fundamental derelictions in the prosecution of an application (violation of discovery obligations, lack of financial qualifications, failure to meet procedural deadlines).<sup>6/</sup> However, reliance on counsel is relevant where the issue is the applicant's good faith in proceeding before the Commission. WEBR, Inc. v. FCC, 420 F. 2d 158, 167-68 (D.C. Cir. 1969); Abacus Broadcasting Corp., 8 FCC Rcd 5110, 5113 (¶12) (Rev. Bd. 1993). Here, the record contains no evidence of any prior questions about Mr. May's legal representation. To the contrary, there is substantial evidence that Dr. Crouch had good reason, based on experience, to rely on Mr. May. Thus, Glendale/SALAD's arguments should be rejected.

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<sup>6/</sup> See, Carol Sue Bowman, 6 FCC Rcd 4723 (1991), citing Hillebrand Broadcasting Corp., 1 FCC Rcd 419, 420 n. 6 (1986) (SALAD PFCL ¶112).

### **3. De Facto Control Factors**

37. Glendale/SALAD's arguments regarding the de facto control issue are fundamentally flawed in two respects. First, they ignore a great deal of relevant evidence and substitute erroneous speculation and personal attack. Second, they ignore pertinent precedents and substitute rhetoric and false innuendo. Since TBF's proposed findings and conclusions already set forth the relevant evidence and precedents that Glendale/SALAD omit, this reply will address only certain salient points.

#### **a. Board of Directors**

##### **(1) Key Decisions**

38. Glendale/SALAD argue that what is "particularly revealing" in assessing control is how the entity functions when faced with a major decision. (Glendale PFCL I ¶603.) They then selectively address three NMTV Board decisions, distort what actually happened, and dismiss and mischaracterize other NMTV decisions that refute their position. We address these matters below.

##### **(A) Sale of the Houston Station**

39. During the hearing, the Bureau and Glendale developed extensive testimony concerning NMTV's decision not to build a station in Houston that Paul Crouch wanted to build. The issue was important for two reasons: (a) it addressed whether Dr.

Crouch intended to control NMTV, and (b) it addressed whether he did in fact control NMTV. TBF's proposed findings at ¶¶47-53 fully and accurately summarize the extensive record concerning this matter, including: Dr. Crouch's desire to have TBN programming and telethons broadcast on the Houston facility; Jane Duff's recollection that site problems delayed construction in Houston to a time when NMTV was heavily involved elsewhere with its full power stations; the evidence from the Commission's records supporting her recollection; her desire not to build the station but to sell the permit instead; her discussions with Pastor Espinoza regarding that sale; and her contemporaneous letter establishing that Dr. Crouch's desire to build the station did not prevail.

40. None of that evidence appears in Glendale/SALAD's submissions. Instead of reciting the record facts, Glendale/SALAD address the matter through sheer argument. They contend that whether to sell the Houston station "was merely a disagreement between Jane Duff and Paul Crouch" (Glendale PFCL I ¶601, ¶107). And they charge that counsel and Pastor Espinoza have "patently" lacked candor by "concocting" and presenting a "fiction" (Id. ¶¶106-07). Neither argument substitutes for the facts.

**(i) Jane Duff Made the Decision**

41. Glendale/SALAD beg the issue when they argue that the decision whether to sell or build the Houston station was merely

a disagreement between Paul Crouch and Jane Duff. Assuming arguendo that only Dr. Crouch and Mrs. Duff were involved in this matter, the crucial question is who prevailed in the disagreement, who controlled the decision. At the outset of the hearing, Glendale/SALAD successfully argued that evidence is relevant to de facto control only if it tells who made the decisions. (Tr. 479-82, 836.) Now, faced with evidence that an important disagreement occurred between Dr. Crouch and Mrs. Duff, they want to ignore the answer to their own question -- which is that Mrs. Duff, not Dr. Crouch, controlled the decision. Clearly, if TBN held a permit to build a station in Houston and Dr. Crouch wanted it built so TBN could broadcast its telethons and programs, TBN would build the station. It therefore is indeed "particularly revealing" that when NMTV confronted that decision, Mrs. Duff controlled what happened.

42. Simply put, the disagreement about selling the Houston station shows much about the mindsets of Dr. Crouch and Mrs. Duff regarding NMTV. Despite Glendale/SALAD's rhetoric about TBN's alleged financial control over NMTV, there is no evidence that TBN or Dr. Crouch used or contemplated using TBN's financing to try to control this or any other decision. The Seven Hills Television Company, supra, 2 FCC Rcd at 6880 (de facto control not found where there was no evidence that the financing parties "ever threatened to cease their financial assistance or to call in their loans if the licensee corporations did not comply with their (hypothetical) wishes"). Despite Glendale/

SALAD's characterization of NMTV's Directors as Dr. Crouch's captives, there is no evidence that TBN or Dr. Crouch used or contemplated using TBN's employment of Mrs. Duff to try to control this or any other decision. Spanish International Television Co., Inc., supra, 5 RR 2d at 6 (control cannot be found based on speculation that employees are beholden to their employer). Nor is there any evidence that Mrs. Duff would have submitted to such efforts. If Dr. Crouch had thought of Mrs. Duff as his "subaltern" (Glendale PFCL I ¶590), the answer to the question of who made the decision on Houston would be Dr. Crouch. However, the answer in fact is Mrs. Duff.<sup>1/</sup>

(ii) **Pastor Espinoza Did Not Lack Candor**

43. Paul Crouch and Jane Duff were not the only ones involved in the decision about the Houston permit. Glendale/SALAD concede that Pastor Espinoza was involved "because Jane Duff chose to involve him" and "solicited his support" (Glendale PFCL I ¶¶105, 601), as if those facts are somehow insignificant. To the contrary, those facts show that Pastor Espinoza's status as a Director was recognized and respected, and that Mrs. Duff appreciated that she should have majority support of the Directors for the decision to sell. It is immaterial that Mrs. Duff spoke with Pastor Espinoza by telephone or that he agreed with her recommendation without hearing from Dr. Crouch.

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<sup>1/</sup> As discussed further below (¶¶148-92), Glendale/SALAD have now substantially abandoned the question of who made the decisions as the key inquiry under the de facto control issue.

Members of non-commercial Boards communicate by telephone often, and Pastor Espinoza's support for Mrs. Duff's position without needing input from Dr. Crouch contradicts the contentions that he was Dr. Crouch's captive and that Dr. Crouch controlled NMTV. What is "particularly revealing" about the decision to sell the Houston facility is that Pastor Espinoza was included in the process as the bona fide Director he was, and as for who made the decision, the answer clearly is not TBN or Dr. Crouch.

44. Glendale/SALAD's attack on the candor of counsel and Pastor Espinoza does not alter the conceded fact that Pastor Espinoza was contacted and participated in the decision to sell the Houston permit. The attack is also misguided. Glendale/SALAD find it significant that, when Mrs. Duff informed counsel by letter that Dr. Crouch had been overruled on his wish to build the station, "there is no indication that a copy of the letter was sent to David Espinoza." (Glendale PFCL I ¶105.) However, the letter contains no indication that a copy was sent to Dr. Crouch either. (TBF Ex. 101, Tab A.) The reason is that the letter was plainly written to advise counsel of a decision that already had been made, not to inform the other Directors, who already knew it. Glendale/SALAD's observation is therefore meaningless.

45. Glendale/SALAD also allege that "[i]n point of fact, at his deposition in this case, David Espinoza had no recollection of this matter." (Glendale PFCL I ¶106; emphasis added.)

This insinuates that Pastor Espinoza was specifically asked at his deposition about the sale of the Houston permit and did not recall it. That is not what happened.

46. Rather, at his deposition, after he testified about NMTV Board disagreements regarding the Odessa station, Pastor Espinoza was asked a general question about whether he recalled "other disagreements" and responded "it's very possible that there were. Right now I don't remember that." (Tr. 4207, 4209.) At the hearing Pastor Espinoza explained his subsequent recollection of the specific Houston decision as follows:

"Q And I'm asking you, pastor, was your recollection refreshed on this point, that is, the disagreement that your testimony says you had with Paul Crouch concerning the sale of the Houston construction permit?

A I don't think it was so much a matter that it was refreshed, Mr. Cohen. These are things that, that they seem like another lifetime ago. But in, in, in the depositions and, and in these hearings or, or the depositions, you try and start focusing on, on events. Some things I, I don't remember. Some things, after the deposition, for example, as I started thinking about it, then I would remember them. So, it, it, it's, it's, it's just a matter that some things you remembered, some things you didn't. Later on you would think about it. That's all.

Q I -- all I want to find out, pastor, is how it came about that at your deposition you didn't remember, and in your testimony is quite clear? What I'm trying to find out is what occurred to make your memory so clear in your testimony, while at your deposition you said at line 41, 'Mr. Cohen, it's very possible that there were. Right now I don't remember them.' Can you help me on that?

A Sure. Well, it's just like I said. The deposition kind of forces you to start reliving or refocusing on some of those events. Some things at the deposition I didn't remember and later on, in, in, in



going home or days later, then you, you keep thinking about those events. And it came to mind, sir." (Tr. 4209-10.)

Pastor Espinoza then was shown Mrs. Duff's letter informing counsel of the decision to sell the Houston permit and testified as follows:

"Q This is a, this is a matter that, that's referred to in your testimony. Does this letter help you recall.

A Mr. Cohen, not necessarily, because later on I did remember that this is something that Mrs. Duff and I had talked about and we were not in agreement with, with Mr. Crouch. I had not seen this letter before, sir, but I do know later on I recall that Mrs. Duff and I had talked about it and, and that we were just not in agreement.

Q So, this letter doesn't help your recollection of the event?

A It's something I had already remembered, sir." (Tr. 4213; emphasis added.)

Pastor Espinoza then twice specifically confirmed that he had a "clear" and "specific" recollection of Mrs. Duff calling him to discuss selling the Houston permit. (Tr. 4220.)

47. Thus, what clearly happened was that during a deposition that covered ten years of events in Pastor Espinoza's life dating back to 1980, and concerning a company with which he had not been associated for several years, Pastor Espinoza was asked a general question and did not instantaneously call to mind his discussion with Mrs. Duff regarding the Houston permit.

However, as he began to reflect and refocus on those events, he remembered it. To call that a lack of candor is absurd.<sup>8/</sup>

48. Glendale/SALAD next cite three alleged discrepancies in Pastor Espinoza's written testimony from which they argue that he and counsel concocted a fiction. (Glendale PFCL I ¶106.) However, two of the alleged discrepancies are not discrepancies at all. In his written testimony, Pastor Espinoza recalled that the Houston station was a low power station that was not as strong as NMTV wanted. (TBF Ex. 106, p. 12.) At the hearing, he recalled that the station was authorized for the community of Stafford and he wanted it to have "a wider scope of reachability," but he did not recall the specific power of the station or whether it would have reached Houston. (Tr. 4218, 4220.) Contrary to Glendale/SALAD's argument, it was not inconsistent for Pastor Espinoza to have a general recollection

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<sup>8/</sup> The accusation is especially unjustified when compared to other testimony given in this proceeding. During the hearing the author of Glendale's lack of candor allegations himself testified (in May 1994) about a conversation that occurred in late 1991 and repeatedly stated that he could not recall any substance because "it was too long ago." (Tr. 5653-65.) The witness specifically testified that "I can't tell you what it was because this was, what, 4 years ago" (Tr. 5653; emphasis added), when the discussion actually had occurred only two and a half years earlier. Further, the conversation concerned information to be filed with the Commission under a formal compliance program the witness had devised to ensure meticulous attention to the accuracy of such information, and thus was information the witness should have remembered. If Pastor Espinoza had given the same testimony, Glendale would now surely be accusing him of misrepresentation, evasion, and lack of candor. But such charges should not be casually made. (See ¶¶201-04 below.) The fact that following his deposition Pastor Espinoza remembered events which occurred four years earlier is no ground for finding that he lacked candor in so remembering.

from four years earlier that the Houston station would have lower power and less reachability than desired, while not recalling specifically the exact power or service contour. For the reasons stated in n. 8 above, the author of Glendale's argument should be especially sensitive to the fact that after several years' time parties may retain such general recollections while losing track of the details. That does not make the general recollection a fiction.

49. Similarly, it simply is not true, as Glendale/SALAD allege, that Pastor Espinoza "had no knowledge" as to the status of the low power construction referenced in his testimony. (Glendale PFCL I ¶106.) In his written testimony, Pastor Espinoza recalled that the question of selling the Houston permit arose when NMTV had "a few translator authorizations." (TBF Ex. 106, p. 12.) At the hearing, he specifically remembered that one of those authorizations was in Fresno, and he recalled the specific authorization for Stafford. (Tr. 4217-18.) That does not constitute "no knowledge." Moreover, it again was not inconsistent for Pastor Espinoza to have a general recollection from four years earlier that NMTV had a few translator authorizations, and a specific recollection that two of those authorizations were in Fresno and Stafford, while not recalling other specific communities. Those facts likewise do not make Pastor Espinoza's recollection a fiction.

50. Counsel did make a mistake in drafting Pastor Espinoza's testimony that Pastor Espinoza did not recognize when he reviewed it. The testimony stated that NMTV had two full power stations under construction when the decision to sell Houston was made, when actually only Portland was under construction, while Odessa had recently gone on the air. That regrettable mistake was made under the time pressure of preparing TBF's extensive direct case in this proceeding. However, to call that mistake a deliberate effort by counsel to concoct fictitious testimony is, we respectfully submit, overreaching and unjustified.

51. The central point of Pastor Espinoza's testimony is that the decision to sell the Houston permit was based on Jane Duff's feeling that NMTV was too busy developing its full power stations. Specifically, his written testimony states:

"Mrs. Duff called me during this time period to discuss a proposal to sell the construction permit. Mrs. Duff reported that Dr. Crouch did not want to sell the permit but instead wanted to build the station. She told me that she disagreed with him because she felt that the corporation had as much on its plate as it could handle. Mrs. Duff asked me what I thought, and I agreed with her that the corporation had to walk before it could run, we simply had too much to do. In addition, although I knew that Houston had a large Hispanic population, the station was a low power station and was not as strong as we wanted. The main factor in my decision, however, was Mrs. Duff's feeling that the corporation simply had too many projects to develop at the same time." (TBF Ex. 106, p. 12; emphasis added.)

During the hearing Pastor Espinoza confirmed that testimony from the witness stand:

"I think I was thinking in terms of -- we now have -- at the time that Mr. Crouch wants to build the station, I felt that presently we were taking our first steps and I just wanted to take it slowly." (Tr. 4216; emphasis added.)

The fact that Odessa had recently gone on the air, while Portland was under construction, does not change the fundamental reality that NMTV was indeed extremely busy developing its full power stations. The construction of Portland alone was an immense undertaking and, while Odessa was no longer under construction, it was very much a start-up operation actively seeking to obtain cable carriage. (TBF PFCL ¶¶49, 75, 183-84.) Accordingly, the mistake in Pastor Espinoza's written testimony was just that, a mistake, and not a concoction to present a fiction. See, e.g., Weigel Broadcasting Company, 2 FCC Rcd 1206, 1210 (1987).

52. In short, the facts regarding NMTV's decision to sell the Houston permit are particularly revealing because they show that Jane Duff and Pastor Espinoza functioned as Directors to make an important decision that Paul Crouch and TBN did not want made. In an effort to brush aside that inconvenient fact, Glendale/SALAD ignore most of the record evidence and opt for personal attacks instead. Despite the Glendale/SALAD accusations, counsel plainly did not concoct Pastor Espinoza's hearing testimony that he recalls discussing the issue with Mrs. Duff (¶46 above), that he and Mrs. Duff disagreed with Dr. Crouch (Id.), and that the reason was that they did not want to take on too much at once (¶51 above); or Mrs. Duff's hearing testimony

that she too has a "specific recollection" of those events. (Tr. 1499-1502.) Nor did counsel concoct their written testimony either. The complete facts concerning the decision to sell the Houston permit are exactly as set forth in ¶¶47-53 of TBF's proposed findings, which should therefore be adopted.<sup>9/</sup>

**(B) Construction and Operation of the Odessa Station**

53. Glendale/SALAD also work overtime to try to discredit the involvement of Jane Duff and Pastor Espinoza in making key decisions that NMTV should construct and operate its Odessa station. (Glendale PFCL I ¶¶94-98, 598-99.) The broad facts are: that as early as June 1987 Paul Crouch did not want NMTV to build or operate Odessa (TBF PFCL ¶41); that not until two years later, in May 1989, did Mrs. Duff and Pastor Espinoza first agree that efforts to sell the station should be made (Id. ¶77-78); and that not until four years later, in April 1991, was the station sold (Id. ¶78). Throughout that period, NMTV remained the permittee and licensee of a station in Odessa that Dr. Crouch did not want to build, instead of a larger market

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<sup>9/</sup> The issue concerning sale of the Houston permit is one of several points on which Glendale/SALAD have strategically decided to attack Pastor Espinoza's candor to advance their position. (See ¶¶61-62, 223-27, 229 below.) As anyone who spent several days in depositions, hearings, and off the record discussions with Pastor Espinoza knows, whatever shortcomings he had as a Director of NMTV, he is nothing if not a thoroughly honest human being. Even aggressive advocacy has lines of decency that should not be crossed, and to request an Initial Decision that publicly defames Pastor Espinoza as deceitful and evasive crosses that line. The Presiding Judge should have no part of such arguments.

station. (Id. ¶40.) What is "particularly revealing" about these key decisions is that if Dr. Crouch and TBN intended to control and did control NMTV, their exercise of control was extremely inept. Returning again to the question of who made the decisions, the record shows that Mrs. Duff and Pastor Espinoza made them. (Id. ¶¶40-46.)

54. Glendale/SALAD's efforts to discredit the roles of Mrs. Duff and Pastor Espinoza in making the pertinent decisions about Odessa follow their standard formula: ignore and misstate the evidence and substitute personal attack. The formula still fails.

55. Initially, Glendale/SALAD improperly telescope years of events into an abbreviated time frame to make it appear that Mrs. Duff and Pastor Espinoza came into agreement with Dr. Crouch almost immediately and without relevant intervening developments. That is not true. For example, while Glendale/SALAD argue that Dr. Crouch's goal to divest Odessa "was in fact implemented in short order" (Glendale PFCL I ¶¶102, 599), two years elapsed, from June 1987 to May 1989, before Mrs. Duff and Pastor Espinoza decided that Odessa should be sold, and four years elapsed before that decision was implemented. Those time periods do not add up to "short order." In the interim, many significant things happened that Glendale/SALAD ignore: the conduct and consummation of negotiations to purchase land for the station's tower and transmitter site; the expenditure of

over \$700,000 to build the station; the employment of a staff to operate the station; and efforts to obtain cable carriage for the station (TBF PFCL ¶¶43, 71, 75) -- all for a station that Paul Crouch did not want to build. As with the decision to sell the Houston permit, there is no evidence that Mrs. Duff and Pastor Espinoza were Dr. Crouch's "subalterns" or "captives" when they decided to do what he thought should not be done. See, cases cited at ¶42 above.

56. Likewise, in trying to emphasize that "only five months" passed between the December 1988 meeting where Mrs. Duff and Pastor Espinoza rejected Dr. Crouch's renewed proposal to sell Odessa and their May 1989 decision to commence efforts to sell, Glendale/SALAD pretend that nothing happened during that period. (Glendale PFCL I ¶¶94, 598.) However, Mrs. Duff testified that during that period "we had expected [revenue] to grow more than it did," and that revenues proved insufficient to build a studio, produce local programming, and repay NMTV's debts. (Tr. 1779, 1857-58, 1883; TBF PFCL ¶¶72, 77.) In an egregious distortion of the record, Glendale/SALAD respond:

"There is in fact no evidence of record beyond undocumented assertions that the Odessa station's financial performance was substandard." (Glendale PFCL I ¶97; emphasis added.)

\* \* \* \* \*

"There is no extrinsic evidence of unexpected financial reversals at Odessa...." (Id. ¶103; emphasis added.)

\* \* \* \* \*



"Obviously recognizing the defect in this contention, NMTV concocted the explanation that Jane Duff and David Espinoza changed their positions because of unexpected financial reverses at Odessa. There is in fact no evidence to support this excuse." (Id. ¶599; emphasis added.)

57. Glendale/SALAD obviously have not read the record. As set forth at TBF PFCL, p. 54, n. 24, there is highly reliable documentary evidence in the form of NMTV tax returns and financial statements that corroborate Mrs. Duff's testimony. She did not testify that the Odessa station's financial performance "was substandard," as Glendale/SALAD mischaracterize. Rather, she said that revenues had not grown as much as expected and could not support studio construction, local production, and debt repayment. The documents show that, in fact, the station's monthly revenues declined by 36% after December 1988. (TBF PFCL, p. 54, n. 24.) They also show that by the end of 1989 the Odessa station had a fund balance of only \$210,506 and debts of \$1,052,253, as well as the declining revenues. (MMB Ex. 322, p. 8.) Thus, production of just one weekly half hour program at a cost of \$5,000 per program would have wiped out the entire fund balance and left a deficit of tens of thousands of dollars, without considering the costs of studio construction (over \$1.1 million in Portland) or debt repayment. Not only is Glendale/SALAD's position factually wrong, it is thoroughly hypocritical. They fault NMTV for its alleged inability to repay the debt to TBN (¶20 above), but then fault Mrs. Duff and Pastor Espinoza for making a prudent business decision not to incur such debt in